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March 20, 2015

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VIA E-MAIL and CERTIFIED MAIL

Robert Werner, Enforcement Officer
United States Environmental Protection Agency
Region 6
1445 Ross Avenue (6SF-TE)
Dallas, TX 75202

Re: General Notice Letter for the CES Environmental Services, Inc. – Houston Superfund Site in Houston, Harris County, Texas

Dear Mr. Werner:

We represent Texas Water Management, LLC (“TWM”), who has asked us to respond to the agency’s February 27, 2015 letter stating that it considers TWM to be a Potentially Responsible Party (“PRP”) for the CES Environmental Services, Inc. – Houston Superfund Site (the “CES Site”). As explained more fully below, we do not believe there is any basis for finding TWM liable as a PRP under the Comprehensive Environmental Response Compensation and Liability Act (“Superfund”) because either (1) the materials that TWM transported to the CES Site qualify for the petroleum exclusion and are, therefore, not hazardous substances under Superfund, or (2) for those shipments that do not qualify for the petroleum exclusion, if any, TWM was simply a transporter, acting under the direction of CES, and did not select the disposal facility.

The documents the agency provided linking TWM to the CES Site consist of one shipping manifest on TWM letterhead and four bills of lading on CES letterhead, each of which indicates that Texas Water Management, LLP¹ transported “oily water” to the CES Site. TWM has searched its files and has determined that it transported materials to the CES Site under two different arrangements: (1) it picked up materials from its customers and selected the CES Site for disposal, or (2) at CES’s instruction, it picked up and transported materials to the CES Site.

¹ In 2010, Texas Water Management converted from a limited liability partnership to a limited liability corporation.



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TWM is not liable under Superfund for materials for which it selected the CES Site as the disposal site because the materials qualify for the petroleum exclusion and are not hazardous substances.

In the first case, where TWM selected the CES Site, TWM only transported "oily water" collected from gasoline station underground storage tanks. The tanks contained rainwater that seeped through the ground into the underground storage tanks; the water and gasoline separated in the tanks and TWM removed the water, leaving the gasoline in the tank. The only contaminant in the water was unused, uncontaminated gasoline.

Under Superfund, "petroleum, including crude oil or any fraction thereof," is excluded from the definitions of "hazardous substance" and "pollutant or contaminant" (the "petroleum exclusion"). 42 USC §§ 9601(14) and (33). EPA has interpreted this exclusion to apply to hazardous substances normally found in refined petroleum fractions, including refined or blended gasoline, as long as the hazardous substances are not present at levels which exceed those normally found in such fractions. *See Scope of the CERCLA Exclusion Under Section 101(14) and 104(a)(2)*, EPA Gen. Counsel Memo, July 31, 1987 at 5; 51 Fed. Reg. 41,900, 41,904. The courts have further clarified that the petroleum exclusion applies to contamination from leaking underground storage tanks at gasoline stations. *Niecko v. Emro Marketing Co*, 769 F. Supp. 973, 982 (ED Mich. 1991) and *Bunger V. Hartman*, 797 F. Supp. 968, 972-73 (S.D. Fla. 1992).

The oily water that TWM picked up from gasoline stations is analogous to a spill of gasoline from an underground storage tank; the oily water collected from the underground storage tanks only contains unused, uncontaminated gasoline from the tank, which qualifies for the petroleum exclusion. Because the materials for which TWM selected the CES Site for disposal are not hazardous substances, TWM is not a PRP and is not liable under Superfund.

TWM is not liable under Superfund for materials it transported at the instruction of CES because it did not select the CES Site for disposal.

Under Superfund, a person who accepts hazardous substances for transport to a disposal site may be a PRP if that person selected the site for disposal. 42 U.S.C. § 9607(a)(4). As noted, to the extent TWM transported oily water collected from gasoline storage tanks, it is not liable as a PRP. In some instances, TWM acted as a transporter for CES. In those instances, even if some of the materials TWM transported at CES's instruction did not qualify for the petroleum exclusion and were hazardous substances, TWM is not a PRP because TWM acted only as a transporter that did not select the disposal site.

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Based on the information in this letter, TWM requests a written acknowledgement from the agency that it is not a PRP for the CES Site.

Thanks for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Civins". The signature is written in a cursive, flowing style.

Jeff Civins

haynesboone

Attorneys and Counselors
600 Congress Ave., Suite 1300
Austin, Texas 78701-3285

ROBERT WERNER

Location:
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Sender:
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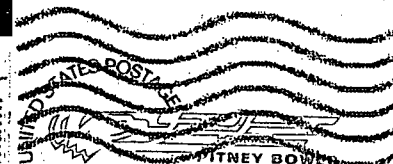
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